No. 15,541

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF NEVADA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada.

APPELLANT'S BRIEF.

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JURISDICTION.

Jurisdiction of the District Court in this case is based on Secs. 1340 and/or 1345 of Title 28 U.S.C.A. It was alleged in the complaint (R. 3) that this action was authorized by the Commissioner of Internal Revenue of the United States and was brought under the direction of the Attorney General of the United States.

That the defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Las Vegas, Nevada (R. 3).

Jurisdiction of this court on appeal is based upon its statutory appellate jurisdiction 28 U.S.C.A. 1291, and the timely invocation, by appellant, of the prescribed procedure (Rule 73, Fed. Rules Civ. Proc.; R. 45-52).

STATEMENT OF CASE.

On August 31, 1954, the delinquent taxpayer, John D. Bentley, also known as J. D. Bentley, of Las Vegas Nevada, had prepared and executed a financial statement (R. 17-18) with the defendant, Bank of Nevada which statement was also signed by an officer of the Bank of Nevada, and which statement contained an agreement between the taxpayer and the bank providing in substance that the taxpayer, for the purpose of procuring funds from the bank by promissory notes and otherwise, furnished said statement and agreed that in the event of any material change in the financial condition of said taxpayer, or if any deposit account of the taxpayer should be attempted to be obtained or held by writ of attachment, garnishment or other legal process, then in such a case, at the option of the bank, all obligations of the taxpayer to the bank or held by the bank should immediately become due and payable without demand or notice. This agreement provides specifically that it is a continuing statement of the taxpayer-depositor until terminated in writing.

Thereafter, on November 15, 1954, certain withholding and Federal Insurance Contribution Act taxes in

he amount of $804.50 were assessed against J. D. Bentley, the taxpayer referred to herein, and on January 12, 1955, a notice of tax lien was properly recorded with the County Recorder of Clark County, State of Nevada (R. 14).

Thereafter, on February 28, 1955, the taxpayer executed and filed with the bank a new financial statement, (R. 15-16) which contained an agreement identical in all respects with the financial statement executed and filed with the bank on August 31, 1954.

On March 1, 1955, federal excise taxes in the amount of $187.51 were assessed against the taxpayer, and a notice of tax lien pertaining to the assessment was filed with the office of the County Recorder of Clark County, State of Nevada, on June 13, 1955 (R. 29).

On April 16, 1955, the taxpayer and his wife executed a promissory demand note in favor of the bank for the sum of $2,000.00, which sum was deposited to the taxpayer's account on the same date (R. 22). The note provided for payment of the principal sum "on demand; if no demand is made then on August 14, 1955" (R. 19).

On May 31, 1955, the taxpayer executed and deposited with the bank a third financial statement (R. 20-21) identical in all respects with the two previous financial statements filed with the bank except as to the sums or amounts contained therein representing the taxpayer's assets and liabilities, but containing the same agreement giving the bank a right of set off

as contained in the original statement of August 31 1954.

On June 10, 1955, the taxpayer had on deposit t his account with the defendant, Bank of Nevada, th sum of $878.16 (R. 26) which was the then existin balance in his commercial account with said bank. O that date, the District Director of the Internal Reve nue served a notice of levy (R. 28) upon the defend ant at 1:45 P.M. of said day, and thereafter the ban exercised its right of set off under the terms of th agreement with the taxpayer-depositor (R. 17-18) and under the terms of the promissory demand not (R. 19), and charged off the sum of $878.16 again the taxpayer's account leaving no balance on depos as of that date (R. 26). Upon the same date, June 1 1955, the defendant, by its Vice-President and Ma ager, wrote a letter to the collection officer, who ha served the notice, which acknowledged receipt of th notice of levy and informed the collection officer th the bank had exercised its right of set off and ha applied the funds in the taxpayer's account to an u secured indebtedness held by the bank, and that the were no funds available under the tax levy (R. 12.

The "unsecured indebtedness" referred to by t bank was the balance due upon the promissory d mand note referred to above which, at the time of t levy, amounted to $1,500.00 (R. 12).

Thereafter, on June 14, 1955, the District Directr of Internal Revenue served a final demand upon te bank, as required by the Internal Revenue Code 194 (R. 12-13).

On March 14, 1957, the trial court, after submission of briefs and oral argument, found that the plaintiff's tax liens were paramount and valid liens and that plaintiff was entitled to judgment in the amount of $878.16 plus legal interest and costs as provided by Section 6332 Internal Revenue Code 1954, 26 U.S.C.A. 6332 (R. 32-43).

On March 29, 1957, judgment for plaintiff was entered in the above amount (R. 44).

SUMMARY OF ARGUMENT.

As the argument will disclose, the principal difficulty or questions involved in this case results from the refusal of the trial court to find that the agreement contained in the financial statement between the taxpayer-depositor and the appellant bank (R. 17 and 18) created a right in the bank to set off against the deposit any indebtedness owing by the depositor to the bank, which right of set off was paramount to the government's subsequent tax lien. Further, the record discloses that the bank was the holder of a demand note executed by the taxpayer-depositor, which, being a matured indebtedness, could be charged against the taxpayer's deposit at any time. Finally, the trial court refused to recognize that as a result of the paramount right in favor of the bank to set off the taxpayer's indebtedness against the deposit the bank was not in possession of any property of the taxpayer subject to the tax levy.

SPECIFICATION OF ERRORS.

1. The opinion of the trial court and the judgment entered thereon (R. 32-44) are contrary to law and are not supported by the evidence.

2. The trial court erred in finding the sum on deposit with the defendant bank in the account of the taxpayer was, at the time of the service of notice of levy by the District Director of the Internal Revenue Bureau, property of Bentley, the taxpayer (R. 34).

3. The trial court erred in finding that it was the intention of the parties that the note was to become due August 14, 1955, unless in the meantime a formal demand by the bank for payment was made (R. 36)

4. The trial court erred in finding that at the time of the service of the notice of levy, no part of the obligation secured by the note was due (R. 37).

5. The trial court erred in finding that on June 10, 1955, and prior thereto, the amount on deposit to the credit of taxpayer, Bentley, was burdened with the prior existing tax liens (R. 40).

6. The trial court erred in finding that the federal tax liens upon all property and rights to property belonging to the taxpayer arose prior to the loan of April 16, 1955, and prior to any right of set off on the part of the bank (R. 38).

7. The trial court erred in finding the plaintiff's tax liens were paramount and valid liens (R. 43).

ARGUMENT.

HE TRIAL COURT ERRED IN IGNORING THE ESTABLISHED PRINCIPLE THAT THE BANK HAS A GENERAL LIEN OR RIGHT OF SET OFF AGAINST THE DEPOSITS OF THE DEPOSITOR FOR THE INDEBTEDNESS OF THE DEPOSITOR TO THE BANK.

It is the general rule that the relationship between bank and its depositor is that of debtor and creditor. When a deposit is made upon a general account, such eposit becomes a part of the general funds of the ank, with title thereto having passed to the bank subect to the use of the depositor (Michie on Banks and anking, Vol. 5A, Chapter 9, Sections 1 and 4b; *nited States Fidelity, etc., Co. v. First Nat. Bank,* 72 F. (2d) 258; *Ex Parte Rickey,* 31 Nev. 82, 100 . 134; *McStay Supply Co. v. Cook & Co.,* 35 Nev. 34, 132 P. 545). It is also well accepted that the eneral rule that a bank has a general lien upon or ight of set off against all monies or funds in its possession belonging to a depositor to secure the payment f a depositor's indebtedness to it is a part of the law erchant and well established in commercial transctions (Michie on Banks and Banking, Vol. 5A, hapter 9, Section 114).

Such a right can be further implemented by specie agreement between the bank and depositor as will e seen from the subsequent argument herein and as rescribed by the case of *Updike v. Manufacturers rust Co.,* 243 App. Div. 15, 275 NYS 716, and the ase of *United States v. Winnett,* 165 F. 2d 149. This ight of the bank to set off the deposit against indebtdness owing from the depositor to the bank does

not depend upon the existence of a lien in its favo on deposited funds, but on the principle that th balance due between the parties is thus ascertaine (Michie on Banks and Banking, Vol. 5A, Chapter 9 Section 114, pages 276-277; 7 Am. Jur., Sections 629 630.)

It is, therefore, the contention of appellant that i had a right to set off by virtue of a specific agreemen with its depositor, as shall be hereafter set forth i the argument and by virtue of a demand promissor note which was a matured obligation owing to Appe lant from the taxpayer-depositor, and that only th sum left, after deducting the debits from the credit in favor of the depositor was the balance or propert subject to the tax lien.

THE TRIAL COURT ERRED IN FINDING THE PROMISSORY NO WAS NOT A DEMAND NOTE AND DUE IMMEDIATELY UP DELIVERY.

The trial court found that the promissory no involved in this matter was not an obligation due an payable without a formal demand by the appellat bank upon the depositor for payment of the note. Th conclusion is based primarily upon the writing whi appears upon the face of the note, on demand, 'f no demand is made then on August 14, 1955''(R. 3- 35-36). Appellant believes that this conclusion of te trial court is against the law and the evidence, n addition to being contrary to the intentions of te parties at the time the said note was executed.

The rule now generally adopted regarding a demand promissory note is that a promissory note payable on demand becomes due and payable upon delivery, and the statute of limitations begins to run thereon from the date of its execution, and not from the time of demand, as payment can be immediately demanded and an actual demand is not necessary to complete the cause of action (8 Am. Jur., Section 278).

There is a conflict of authority regarding the proposition set forth in the trial court's opinion that when there is something on the paper or in the circumstances under which a note was given to show that it was not the intention of the parties that it should become due immediately that the note does not mature immediately (R. 35-36). The Appellant believes that the better view is that a note such as the one involved in this case is a demand note and becomes due and demandable immediately after its delivery or in any event not later than the date stated therein (R. 19).

The important thing to consider is when the note matured. Maturity means the time when the note becames due and demandable, or the time when an action can be maintained thereon to enforce payment (*Tooling v. Springer,* 30 A. 2d 466, 3 Terry 228).

The words "on demand" serve the same purpose as words making the instrument payable at a specified time, simply fixing the maturity of the obligation, and to not make a demand necessary, but mean that the instrument is due, payable, and matured when made

and delivered (*Grigg v. Middle States Utilities Co. of Delaware,* 293 N.W. 66, 228 Iowa 933).

A note containing the words "payable on demand after date" at the bottom of which appeared "due July 5, 1920" was held to be a demand note due and payable immediately (*Miners State Bank v. Ankszto kalnis,* 128 A. 726, 283 Pa. 18). In another case, a note containing the words "on demand on or before September 15, 1902 after date", was held to be a demand note and due and payable immediately (*Alaska-North American Trading etc. Co. v. Byrne,* Alaska 26).

The appellant believes that if all the evidence and circumstances regarding the relationship of the bank and the depositor are considered, including the agreement contained in the financial statement given the bank by the depositor (R. 17-18), it will clearly show that as between the bank and the depositor the intention of the parties was to make the note payable immediately without the necessity of any formal demand for payment being first made by the bank.

THERE WAS NO PROPERTY OF THE DEPOSITOR-TAXPAYER IN THE POSSESSION OF THE APPELLANT SUBJECT TO THE TAX LIEN.

The Internal Revenue Code of 1954, Section 6332 (a) provides:

> "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall,

upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

t is the contention of appellant that it did not have i its possession "property rights to property subject) levy" at the time of demand or levy by the District)irector of Internal Revenue on June 10, 1955 (R. 1-12, Paragraphs 9 and 10).

By reason of appellant's right of set off based upon ie agreement with the bank (R. 17-18) and the de- iand note (R. 19), and recognizing the fact that the ank and its depositor stood in the position of debtor id creditor, there existed no balance in the depositor- ixpayer's account which was subject to levy by the listrict Director of Internal Revenue.

It is unquestioned that the rights of the District)irector of Internal Revenue do not extend beyond ıose of the taxpayer whose right to property is sought) be levied upon (*United States v. Winnett,* 165 F. l 149; *United States v. Bank of United States,* 5 . Supp. 942).

Hence, it is the contention of appellant that al- ıough a bank deposit is property or a right to prop- ty which is subject to levy for an existing tax lien ved to the government, nevertheless the relationship etween the appellant bank and the taxpayer-depositor ıust be examined closely and their accounts balanced

in order to determine whether there exists any cred in favor of the taxpayer which would constitute pro erty subject to levy. Here no such credit existed.

THE RIGHT OF SET OFF IN THE APPELLANT WAS PARAMOUNT TO THE GOVERNMENT'S TAX LIEN.

It is the contention of appellant that by virtue the agreement contained in the financial statement executed by the appellant and the taxpayer-deposit (R. 17-18), which was executed on August 31, 19, prior to the assessment of taxes against the taxpay on November 15, 1954, or the recording of the notice f tax lien on January 12, 1955 (R. 10, Paragraphs 3 a 4; R. 14), that this gives the appellant a right of st off by contract which was paramount to the subsequent tax lien *(Updike v. Manufacturers' Trust C.* (1934) 243 Appellate Division 15, 275 NYS 716, cet. den. 296 U.S. 648, 80 L. ed. 461, 56 S.Ct. 308) whih case cites *Wright v. Seaboard Steel and Mangane Corp.,* 272 F. 807; and *Edwards v. Sterling Natiol Bank and Trust Co.,* 5 F. Supp. 925).

In the recent case of *United States v. Winnt,* supra, it was held that an agreement creating the rit of set off entered into prior to the creation of a x lien gave the parties who had the right of set of a priority over the subsequent lien for delinquent tax, and that the equitable right of set off relates backto the date of the agreement, and the court further hld that the rights of the government cannot rise abve the rights of the taxpayer sought to be levied up.

In the case of *Updike v. Manufacturers Trust Co.,* ıpra, it was held that the bank properly set off gainst the deposit, the note of the depositor which ras not due for eleven days, under the provisions of n agreement contained in the financial statement of ıe depositor.

It is the further opinion of the appellant that to old otherwise than the foregoing decisions would in-ringe upon the rights of a bank and its depositor to ıter in the usual and normal every day commercial ınking transactions, to engage in the normal banking ısiness of loaning money upon the assurance that the epositor will maintain some credits in the bank to ecure his indebtedness, and would completely nullify ell established principles of commercial law.

CONCLUSION.

For the reasons stated herein, appellant respect-ılly submits a decree should issue, setting aside and eversing the opinion and judgment of the lower court ıtered therein.

Dated, July 31, 1957.

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